SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 685

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on April 25, 1967, denying petitioner's motion to reconsider and vacate its order of April 21, 1966 disbarring petitioner from practice as an attorney and counselor at law.

OPINION BELOW

The opinion of the court below is reported at ____A. D.2d____ ,282 N.Y.S. 2d 158.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The order of the Appellate Division was entered on April 25, 1967. On July 7, 1967, the Court of Appeals of the State of New York entered an order denying petitioner leave to appeal.

QUESTIONS PRESENTED

1. Whether disbarment is a criminal sanction within the scope of the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to state action, so that incriminating testimony compelled under a grant of immunity is precluded from use in the disciplinary proceeding.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

No person * * * shall be compelled in any criminal case to be witness against himself * * *.

United States Constitution, Amendment XIV

Section 1 * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on November 4, 1935. On April 21, 1966, in disciplinary proceedings brought by the Association of the Bar of the City of New York, the Appellate Division of the Supreme Court of the State of New York, First Department, entered an order of disbarment which the New York Court of Appeals declined to review on July 7, 1966. Petitioner filed a petition for a writ of certiorari in this Court on November 4, 1966, which was denied on January 9, 1967. *Ungar v. Bar Association*, 385 U.S. 1006. On March 9, 1967, petitioner filed a motion in the Appellate Division for reconsideration and vacation of the disbarment order in the light of this Court's decisions in *Spevack v. Klein*, 385 U.S. 511 and other cases. This motion was denied on April 25, 1967, and leave to appeal was denied by the Court of Appeals on July 7, 1967.

The disciplinary charges grew out of advances of approximately $4,000 made by petitioner in February, March and April of 1958 for remodeling the apartment of Hulan E. Jack, then president of the Borough of Manhattan. In December 1959, the district attorney commenced an investigation and thereafter presented the matter to the grand jury. On December 15, 1959, petitioner appeared before the grand jury, asserted his constitutional privilege against self-incrimination, was directed to testify, was granted immunity from prosecution for any criminal offenses disclosed in his testimony, and testified for ten days. Thereafter, Jack was indicted and convicted on charges of violating conflict-of-interest provisions in the New York City Charter and conspiracy to obstruct justice. On the basis of statements made while testifying in the second

Jack trial, petitioner was thereafter convicted for criminal contempt. *Ungar v. Sarafite*, 376 U.S. 575.

The charges in the disciplinary proceeding were: (1) as a result of conduct in the second Jack trial, petitioner "was found guilty of criminal contempt of court"; (2) during the course of the trial, he "shouted at the court * * * in the immediate hearing and presence of the jury, 'I am being coerced and intimidated, the court is suppressing the evidence' "; (3) he "aided and abetted Hulan E. Jack in violating Sections 886 and 901 of the New York City Charter" by making certain payments for Jack's benefit; and (4) he conspired with Jack "to obstruct justice and the administration of the New York City Charter * * * in violation of Penal Law, Section 580" by concealing these payments.

Petitioner's answer to the charges admitted his conviction for criminal contempt and his making the statement upon which the conviction was based, but denied that he had been guilty of any professional misconduct or that his conduct justified the conviction. He denied the other charges. Among several affirmative defenses, petitioner claimed that the charges of aiding and abetting Jack in the City Charter violations and of conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law because his testimony with respect to these matters before the grand jury had been obtained under a grant of immunity. The Appellate Division struck petitioner's affirmative defenses as insufficient in law and denied petitioner's motion for leave to appeal from this order to the Court of Appeals. The Referee's report sustaining the charges was confirmed by the Appellate Division and the disbarment order was entered. The Court of Appeals denied petitioner's motion for leave to appeal and

dismissed his appeal taken as of right on the ground "that there are no substantial constitutional questions directly involved."

The petition filed in this Court on November 4, 1966, and denied on January 9, 1967, submitted as reasons for granting the writ (1) that the immunity granted to compel petitioner's testimony before the grand jury precluded his testimony from being the basis of disciplinary charges; (2) that procedural due process was violated (a) in permitting petitioner's conviction for criminal contempt to be made a basis of disbarment, although the hearing with respect to criminal contempt was not appropriate for a disbarment penalty, (b) in trying petitioner in the disciplinary proceeding for the criminal charge of aiding and abetting a violation of the City Charter without adequate procedural safeguards, and (c) in finding petitioner guilty of obstruction of justice in the disciplinary proceeding without proper notice of such a charge; and (3) that substantive due process was violated because the severe punishment of disbarment in the circumstances was not reasonably related to the legitimate interest of the State in regulating the practice of law.

The Appellate Division denied petitioner's motion of March 9th for reconsideration on three grounds: (1) Petitioner expressly abandoned his reliance on his federal privilege against self-incrimination. (2) The self-incrimination privilege as defined in *Spevack v. Klein* "does not inhibit the use in a disciplinary proceeding of testimony" compelled under a grant of immunity because "it has not been held that a disciplinary proceeding is in the nature of a criminal cause." And (3) the disciplinary charges based upon petitioner's contempt adjudication and his "contumacious conduct in the trial of *People v. Jack*" were "sufficient to warrant disbarment."

REASONS FOR GRANTING THE WRIT

1. The express articulation by the Appellate Division of the holding, as one ground for its decision, that a disbarment proceeding is not a "criminal case" within the meaning of the privilege against self-incrimination raises an important and heretofore unresolved question with respect to the interpretation of the Fifth Amendment to the Constitution, as incorporated in the Fourteenth Amendment, which warrants review by this Court.[1]

The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" (*Ullmann v. United States*, 350 U.S. 422, 431) whether or not immunity from a particular sanction is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493. When petitioner invoked his privilege against self-incrimination in declining to testify before the grand jury, compelling him to testify by conferring immunity barred the use of this testimony not only in a trial on criminal charges but also in any proceeding which might result in the imposition of a penalty of a criminal nature.[2]

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[1] For reasons which we discuss later, we do not believe the two independent grounds of decision upon which the Appellate Division relied in denying the motion for reconsideration should preclude review of the Appellate Division's holding with respect to the scope of the Fifth Amendment.

[2] We do not have the question whether the federal government is precluded from using testimony compelled by a state under a grant of immunity. *Cf. Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 54. The evidence here involved was exacted by a state prosecuting attorney and, after a request for disciplinary action by the prosecuting attorney, was subsequently used as a basis for disbarment.

The immunity is "as broad in scope as the privilege it replaces." *Stevens v. Marks*, 383 U.S. 234, 246; *Ullmann v. United States*, 350 U.S. 422, 431. Accordingly, if disbarment is "criminal in nature" petitioner was privileged to refuse to give testimony incriminating with respect to disbarment (Cf. *Spevack v. Klein, supra*) and the immunity granted to obtain information would extend to a disbarment proceeding. See *Ullmann v. United States*, 350 U.S. 422, 431.

Thus the question is squarely posed whether a disbarment proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony. Although many decisions of this Court intimate an affirmative answer none is dispositive on the point.

In *Spevack v. Klein*, 385 U.S. 511, expressly overruling *Cohen v. Hurley*, 366 U.S. 117, the Court held that the privilege against self-incrimination is available to attorneys and that disbarment is a punishment which cannot be imposed for invoking the privilege and refusing to testify in an investigation of the conduct of attorneys. In *Kaye v. Coordinating Committee*, 386 U.S. 17, which involved a claim that use of compelled testimony in the disciplinary proceeding violated the privilege against self-incrimination, the Court, *per curiam*, vacated the disbarment order and remanded the case for reconsideration in light of *Spevack v. Klein*. Similarly, in *Zuckerman v. Greason*, 386 U.S. 15, rehearing denied, 386 U.S. 969, the Court, *per curiam*, vacated an order disbarring one attorney and suspending another which was based on the testimony and records of the attorney.

These cases are not necessarily decisive of the question presented here. *Spevack* decided that an attorney can

invoke the privilege in a disciplinary investigation (possibly to avoid incrimination with respect to a statutory crime) but did not expressly hold that it can be invoked with respect to the sanction of disbarment. *Kaye* involved the penalty of an adverse presumption because of his failure to testify as well as the use of compelled testimony in the disciplinary proceeding. Similarly, *Zuckerman* involved the greater punishment of disbarment rather than suspension because the privilege was invoked. Since the Court wrote no opinion in the latter two cases, the precise rationale of the decisions cannot be ascertained.

A question closely related to that presented here was raised but left unanswered in *Ullman v. United States*, 350 U.S. 422, where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled under a grant of immunity might result in disqualification from federal employment and other disabilities. Eschewing a decision as to whether such disqualification was equivalent to criminal punishment for purposes of the self-incrimination privilege, the Court's majority opinion, upholding the validity of the statute, stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. Mr. Justice Douglas' dissenting opinion asserted, however, that "disabilities imposed by federal law [such as "ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment"] are forfeitures within the meaning of our cases and as much protected by the Fifth Amendment as criminal prosecution itself." 350 U.S. at 440-441.

The holding of the court below that the privilege "does not inhibit the use in a disciplinary proceeding of testimony resulting from respondent's [petitioner here] immunity from prosecution therefor" and that a disciplinary proceeding is not "in the nature of a criminal cause" appears to be at odds with the decisions of this Court holding forfeitures within the protection of the privilege. *Boyd v. United States,* 116 U.S. 616; *Lees v. United States,* 150 U.S. 476; *cf. Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 701. Certainly, the forfeiture of one's right to practice his profession or to other employment is no less a penalty than forfeiture of his property. The continued vitality of the *Boyd* case was underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States,* 116 U.S. 616, which the opinion of Mr. Justice Douglas described as a case "where compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). Mr. Justice Douglas also noted that the "views expounded in the dissents in *Cohen v. Hurley* [now overruled] need not be elaborated again." Among the "views" so "expounded" were those of Mr. Justice Black that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land' " (366 U.S. at 147) and those of Mr. Justice Douglas that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154).

Disbarment or denial of the right to engage in other occupations has been held equivalent to a criminal penalty for the purpose of other constitutional provisions in a number of decisions. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's

bill of attainder and ex post facto prohibitions. *Ex parte Garland*, 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Lovett*, 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown*, 381 U.S. 437 (disqualification from holding union office held punishment). Disqualification from the pursuit of one's vocation should also be regarded as equivalent to criminal punishment for purposes of the privilege against self-incrimination. The contrary holding of the court below warrants review by this Court.

The additional grounds of decision advanced by the court below should not deter the grant of a writ of certiorari because (1) the finding of abandonment of the constitutional privilege is not binding on this Court which will re-examine factual determinations bearing on constitutional claims and (2) the determination that "the charges based on the contempt adjudication * * * are sufficient to warrant disbarment" raises other constitutional questions.

2. Contrary to the finding of the court below, petitioner did not abandon his claim based upon the privilege against self-incrimination but clearly asserted it in the Appellate Division and preserved it in his attempts to appeal to the Court of Appeals.[2a] The Fifth Affirmative Defense in petitioner's answer to the disciplinary charges asserted "that the institution of the instant disciplinary proceeding on the basis of the matters" concerning which he testified before the grand jury "is a violation of his

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[2a] See Appendix, pp. A-6 to A-9

constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law." Respondent moved to strike this defense for the reason that petitioner's "federal constitutional privilege against self-incrimination is not involved * * * inasmuch as a disciplinary proceeding is not a prosecution for crime" and "that such a proceeding was not within the ambit of the immunity tendered to respondent in the proceeding before the grand jury."

The finding of express abandonment of the privilege appears to be based on the statement of petitioner's counsel in an affidavit of February 27, 1963, in opposition to the motion to strike, that it did not appear "that the self-incrimination provisions of the Federal Constitution are involved" and that there were grounds for "striking out the reference to the Federal Constitutional privilege against self-incrimination." But the affidavit went on to make clear that it persevered in the constitutional claim and conceded only that it might better be phrased in terms of due process under the Fourteenth Amendment rather than self-incrimination under the Fifth Amendment. Thus, the affidavit opposed "striking out the reference to the federal constitutional privilege against self-incrimination" stating, "We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent to amend the answer by adding the words 'under the State Constitution and his right to due process of law under the Federal and State Constitutions.' " The propriety of petitioner's reliance upon the due process clause in connection with the self-incrimination claim was established more than a year later when this Court held in *Malloy v. Hogan*, 378 U.S. 1, on June 15, 1964, that the self-incrimination prohibitions of the Fifth Amendment are applicable to the States through incorporation in the due process clause of the Fourteenth Amendment.

Notwithstanding the adverse posture of this Court's decisions at the time, after its alleged abandonment, petitioner continued to assert the claim of privilege both in the Appellate Division and in the Court of Appeals.[3] He filed in the Appellate Division a notice of motion and affidavit dated April 22, 1963, seeking leave to appeal to the Court of Appeals from the order of March 21, 1963, striking the affirmative defenses. The notice of motion set forth as a question for review "Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding." A supporting affidavit stated that "the questions involve matters * * * of constitutional law (fifth affirmative defense)" and prayed leave to appeal upon the questions of constitutional law set forth in the fifth affirmative defense.

In the Court of Appeals petitioner's affidavit in support of his motion for leave to appeal from the order of disbarment specifically referred to the affirmative defenses set forth "as paragraphs 6 through 27 of my answer in this disciplinary proceeding." The fifth affirmative defense was set forth in paragraphs 19 and 20 and was clearly embraced within the enumerated paragraphs. Although petitioner purported to rely "principally" on the fourth and sixth affirmative defenses, his reluctance to place particular stress on the fifth affirmative defense is readily understandable in light of this Court's decision in *Cohen v. Hurley* (which has since been overruled) and the Court of Appeals' decision in *Spevack v. Klein*, 16 N.Y. 2d 1048, 213 N.E. 2d 457 (which has since been reversed).

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[3] *Malloy v. Hogan*, 378 U.S. 1, did not resolve the question whether *Cohen v. Hurley*, 366 U.S. 117, remained vital. The Court of Appeals continued to rely on it. *Spevack v. Klein*, 16 N.Y. 2d 1048, 213 N.E. 2d 457; 17 N.Y. 2d 490, 214 N.E. 2d 373.

The claim of the privilege was reiterated in an affidavit verified June 7, 1966, in support of a "motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States, viz., whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated and that the courts held that they were not."

Petitioner's continued assertion of the constitutional claim in various forms is not consonant with the conclusion of the court below that the claim was "expressly abandoned."[4] "There is a presumption against a waiver of constitutional rights * * *, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege' ". *Brookhart v. Janis,* 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights is indulged (*Johnson v. Zerbst,* 304 U.S. 458, 464; *Glasser v. United States,* 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona,* 384 U.S. 436, 475) have obviously not been met.

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[4] The receptiveness of the court below to the argument of abandonment is perhaps illustrated by the statement in its first opinion on the denial of reconsideration that petitioner did not raise the question "on his application for a writ of certiorari to the Supreme Court" which it later corrected. The opinion of the Appellate Division dated April 25, 1967 (282 N.Y.S. 2d 155) stated, "He did not raise the question in the Court of Appeals but did on his application for a writ of certiorari to the Supreme Court." An amended opinion dated April 26, 1967 (282 N.Y.S. 2d 158) stated, "He did not raise the question in the Court of Appeals but did on his application for a writ of certiorari to the Supreme Court." Both opinions are reprinted in the Appendix to this petition.

3. The holding of the court below that the charges based upon the contempt adjudication and petitioner's contumacious conduct in the Jack trial are sufficient to warrant disbarment is not an adequate state ground of decision which should preclude review by this Court since that determination itself involves questions of procedural and substantive due process under the Fourteenth Amendment.

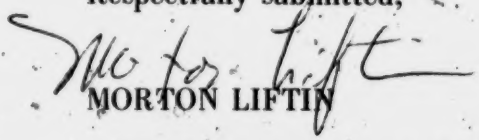
In the petition for certiorari filed November 4, 1966, denied by this Court on January 9, 1967, petitioner urged as reasons for granting the writ (1) that the hearing on the criminal contempt conviction, although upheld for the relatively minor contempt punishment (*Ungar v. Sarafite*, 376 U.S. 681), did not satisfy due process standards for the severe punishment of disbarment (See *Cheff v. Schnackenberg*, 384 U.S. 373; *United States v. Barnett*, 376 U.S. 681; *Speiser v. Randall*, 357 U.S. 513, 520-521; *In Re Murchison*, 349 U.S. 133; *In Re Oliver*, 333 U.S. 257; *Cooke v. United States*, 267 U.S. 517; *Tumey v. Ohio*, 273 U.S. 510) and (2) that the extreme penalty of disbarment in the circumstances was so unrelated to the State's proper interest in regulating membership in the bar as to constitute a violation of substantive due process (*Schware v. Board of Bar Examiners*, 353 U.S. 232; *Gibson v. Florida State Legislative Comm.*, 372 U.S. 539, 546; *DeGregory v. New Hampshire Atty. Gen.*, 383 U.S. 825, 829; *Trop v. Dulles*, 356 U.S. 86, 114; *In Re Isserman*, 345 U.S. 286, together with *In re Disbarment of Isserman*, 348 U.S. 1; *Sacher v. Association of the Bar*, 347 U.S. 388). In view of the action of the Court on the petition previously filed, these contentions are not advanced as reasons for granting certiorari at this time. Since the denial of certiorari imports no views on the merits, however, these points will be argued if certiorari is granted to review the holding of the court below that the privilege against self-incrimination may not be invoked with respect to the sanction of disbarment.

4. Review of the decision below by this Court appears appropriate because the court below has decided a question of substance under the United States Constitution not heretofore determined by this Court and in a manner which appears to be contrary to the holdings of this Court in closely related situations. The importance of the question and the desirability that it be settled is attested by the fact that it is present in cases involving at least three other attorneys (Kaye, Zuckermann and Haber) now pending in the New York courts. [5]

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



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[5] The Court of Appeals in *In re Zuckerman and Haber,* 19 N.Y. 2d 977,281 N.Y.S.2d 528, decided June 1, 1967, in reversing the order of the Appellate Division, Second Department, of March 20, 1967 (280 N.Y.S. 2d 904), held that " The reversal by the United States Supreme Court of the orders in the disciplinary proceedings, with remand to the Appellate Division, leaves room for interpretation. Consequently due process required notice to appellants and opportunity to be heard" before further determinations were made by the Appellate Division.

APPENDIX

OPINION OF APPELLATE DIVISION, APRIL 26, 1967

Respondent's motion for reconsideration is denied. The motion is grounded on Spevack v. Klein (385 U.S. 511). Respondent expressly abandoned his reliance on his federal privilege against self-incrimination (Fifth Amendment to the Constitution of the United States). He did not raise the question in the Court of Appeals but did on his application for a writ of certiorai to the Supreme Court.

Spevack prohibits a waiver of the privilege under the compulsion of the threat of loss of employment. It does not inhibit the use in a disciplinary proceeding of testimony resulting from respondent's immunity from prosecution therefor. The Fifth Amendment proscribes compelled testimony in "any criminal case." Although forfeiture proceedings have been held to be in the nature of criminal proceedings (Plymouth Sedan v. Pennsylvania, 380 U.S. 693), it has not been held that a disciplinary proceeding is in the nature of a criminal cause.

The constitutional question respondent belatedly seeks to revive does not affect the charges based on the contempt adjudication against the respondent (Ungar v. Sarafite, 376 U.S. 575) and respondent's contumacious conduct in the trial of People v. Jack (12 N.Y. 2d 721) heretofore sustained (Matter of Ungar, 25 A.D. 2d 322, app. dismissed 18 N.Y. 2d 690, cert. denied, 385 U.S. 1006), and are sufficient to warrant disbarment.

Order filed.

OPINION OF APPELLATE DIVISION, APRIL 25, 1967

Respondent's motion for reconsideration is denied. The motion is grounded on Spevack v. Klein (385 U.S. 511). Respondent expressly abandoned his reliance on his federal privilege against self-incrimination (Fifth Amendment to the Constitution of the United States). He did not raise the question in the Court of Appeals or on his application for a writ of certiorari to the Supreme Court.

Spevack prohibits a waiver of the privilege under the compulsion of the threat of loss of employment. It does not inhibit the use in a disciplinary proceeding of testimony resulting from respondent's immunity from prosecution therefor. The Fifth Amendment proscribes compelled testimony in "any criminal case." Although forfeiture proceedings have been held to be in the nature of criminal proceedings (Plymouth Sedan v. Pennsylvania, 380 U.S. 693), it has not been held that a disciplinary proceeding is in the nature of a criminal cause.

The constitutional question respondent belatedly seeks to revive does not affect the charges based on the contempt adjudication against the respondent (Ungar v. Sarafite, 376 U.S. 575) and respondent's contumacious conduct in the trial of People v. Jack (12 N.Y. 2d 721) heretofore sustained (Matter of Ungar, 25 A.D. 2d 322, app. dismissed 18 N.Y. 2d 690, cert. denied, 385 U.S. 1006), and are sufficient to warrant disbarment.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of April, 1967

Present - Hon. Bernard Botein, President Justice
" Benjamin J. Rabin,
" James B. M. McNally,
" Samuel W. Eager,
" Aron Steuer, Justices

In the Matter of
Sidney J. Ungar,
An Attorney.

M-1561

The above-named respondent, Sidney J. Ungar, having moved this Court for reconsideration of its order of April 21, 1966 disbarring respondent from practice as an attorney and counselor-at-law in the State of New York, and, upon such reconsideration, vacating said order of disbarment, or, in the alternative, amending the aforesaid order by inserting therein a provision that in this disciplinary proceeding and upon reconsideration there were presented and necessarily passed upon questions under the Constitution of the United States, namely, whether respondent's rights under the Fifth and Fourteenth Amendments were violated, and that said questions have not been waived or abandoned.

Now, upon reading and filing the notice of motion, dated March 9, 1967, with proof of due service thereof,

and the affidavit of Morton Liftin, duly sworn to the 9th day of March, 1967, in support of said motion, and the affidavits of Michael Franck, duly sworn to the 17th day of March, 1967 and the 22nd day of March, 1967, in opposition thereto, and after hearing Mr. Morton Liftin for the motion, and Mr. John G. Bonomi, attorney for The Association of the Bar of the City of New York, opposed, and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the said motion be and the same hereby is denied in all respects.

ENTER:

Hyman W. Gamso

Clerk.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of July A.D. 1967.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, presiding,

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1 Mo. No. 655
In the Matter of
Sidney J. Ungar, an Attorney,
Appellant,
The Association of the Bar
of the City of New York,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

[Seal of the Court of Appeals of the State of New York]

/s/ Geason Kimball
Deputy Clerk

[Claim of Violation of Self-Incrimination Privilege]

RESPONDENT'S [PETITIONER HERE] ANSWER TO CHARGES

* * *

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE LIMITED TO PARAGRAPH "IV-"3" and "4" OF THE PETITION:

19. Respondent testified before a Grand Jury with respect to the matters set forth in the said paragraphs. When respondent sought to waive his immunity, permission to do so was refused by the District Attorney on the ground that such waiver could not be given as a matter of law.

20. Respondent submits that the institution of the instant disciplinary proceeding on the basis of the matters set forth in Paragraph "IV", subdivisions "3" and "4", is a violation of his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. * * * (pp. 8-9.)

* * *

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, FEBRUARY 27, 1963

* * *

THE FIFTH AFFIRMATIVE DEFENSE

* * *

24. We pass over the reference to self-incrimination under the Federal Constitution. In all candor, it does not seem to respondent, upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. In this respect, petitioner would be entitled to a grant of its motion limited to striking out the reference to the Federal constitutional privilege against self-incrimination. We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent to amend the answer by adding the words "under the State Constitution and his right to due process of law under the Federal and State Constitutions." * * * (p. 9.)

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPEAL AND AFFIDAVIT, APRIL 22, 1963

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affidavit of Leonard B. Boudin * * * the undersigned will move this Court at a term of the Appellate Division of the Supreme Court of the State of New York, First Department, for an order granting leave to the respondent to appeal to the Court of Appeals from said order of the Appellate Division, First Department, entered on the 21st day of March, 1963 in the Office of the Clerk of the Appellate Division, First Department * * * and for the certificate

of the said Appellate Division certifying the questions of law decisive of the correctness of its determination and that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals, to wit, whether in disciplinary proceedings instituted in the Appellate Division upon a petition of a bar association, the respondent may not assert the following matters in the form of affirmative defenses:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 1-2.)

* * *

AFFIDAVIT

* * *

5. The issues raised by these affirmative defenses are important to the law governing disciplinary proceedings. The questions involve matters * * * of constitutional law (5th affirmative defense) * * *. (p. 2.)

* * *

WHEREFORE, your deponent prays for an order granting respondent leave to appeal to the Court of Appeals upon questions to be certified by this Court as follows:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 3-4.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT, MAY 25, 1966

Before taking up in further detail the findings and rulings of the Referee and the Appellate Division, I shall briefly enumerate the several motions and applications which were made on my behalf prior to, during and after the Referee proceedings, insofar as pertinent to the issues for appeal in this Court: The first item of the aforementioned category which needs to be mentioned is a motion which was commenced by the petitioner Bar Association, and which I unsuccessfully contested, for the striking of affirmative defenses in answer. I refer to the petitioner's motion dated January 8, 1963, supported by affidavit of Michael Franck, Esq., sworn to on the latter date. The affirmative defenses in question appear as paragraphs 6 through 27 of my answer in this disciplinary proceeding. Principally here involved are my Fourth and Sixth affirmative defenses, which pertained to the contempt charges. (pp. 19-20.)

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND DISBARMENT ORDER, June 7, 1966

I respectfully submit this affidavit in [support] * * * of my presently pending motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States viz, whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated, and that the Courts held that they were not.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 685

SIDNEY J. UNGAR,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1967

No. 685

SIDNEY J. UNGAR,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on April 25, 1967, denying petitioner's motion to vacate the Appellate Division's order of April 21, 1966, disbarring petitioner. On July 7, 1967, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal.

ARGUMENT

POINT I

The present petition for a writ of certiorari is, in substance, an untimely petition for rehearing of this Court's order denying a prior petition for certiorari to review the order of disbarment.

On November 4, 1966, petitioner filed in this Court a petition for a writ of certiorari to review the order of the Appellate Division disbarring him. The principal argument then advanced for granting the writ, in the language of the petition, was that "disciplinary charges based upon matters concerning which petitioner testified before Grand Jury under grant of immunity violate self-incrimination privilege". It appears, therefore, that the principal issue then advanced by petitioner is substantially identical to the only question of which review is now sought.

In that portion of its brief in opposition to the prior petition for certiorari concerning this contention, respondent argued that 1) petitioner had abandoned any claim under the Fifth Amendment of the Constitution of the United States; and 2) in any event, the privilege against self-incrimination was, by its own terms, limited to "any criminal case" and, consequently, immunity did not extend to disciplinary proceedings.

The prior petition for certiorari was denied by this Court on January 9, 1967. One week later, on January 16, 1967, this Court's decision in *Spevack* v. *Klein*, 385 U. S. 511, was announced. This chronology indicates that *Spevack*, the decision upon which petitioner principally relies in support of the present petition for certiorari (Pet. p. 3),

was before the Court at the time it denied the first petition for certiorari. Moreover, the *Spevack* decision was announced well within the 25 days within which petitioner could have filed a petition for rehearing of the order denying his prior petition for certiorari pursuant to Rule 58 of the Rules of this Court. Nevertheless, no such petition for rehearing was filed.

On April 25, 1967, the Appellate Division denied petitioner's motion to vacate its prior order of disbarment. That decision was predicated, in part, upon an express finding that, as respondent had urged in this Court in opposition to the prior petition for certiorari, petitioner had abandoned his reliance upon the federal privilege against self-incrimination. The Appellate Division at the same time denied petitioner's request for the alternative relief of amending the order of disbarment to recite that constitutional questions were raised and necessarily passed upon, relief it had previously denied by order entered June 30, 1966, prior to the filing for the first petition for certiorari in this Court.

In these circumstances, it is respectfully submitted that all of the facts now relied upon by petitioner were in existence at the time his prior petition for certiorari was denied by this Court and that the present petition is, therefore, in substance a petition for rehearing of that prior denial filed outside the time specified by Rule 58 of the Rules of this Court.

POINT II

The order of which review is sought rests upon an adequate non-federal basis.

In denying petitioner's motion to vacate his disbarment, review of which is here sought, the Appellate Division held that the charges based upon petitioner's conviction for criminal contempt, which are concededly not affected by his Fifth Amendment argument, themselves warrant disbarment (Appendix to Pet. p. A-1). Petitioner, although seeking to reserve the point if certiorari is granted, does not contend that this determination by the Appellate Division itself warrant certiorari.

It is respectfully submitted, therefore, that the Appellate Division's determination that petitioner should be disbarred solely on the basis of charges not affected by the issue of which review is sought by the present petition for certiorari constitutes an adequate non-federal basis, within the context of this proceeding, to support the order denying petitioner's motion to vacate his disbarment.

POINT III

Petitioner categorically abandoned any claim arising under the Federal privilege against self-incrimination while the disciplinary proceeding was pending.

Petitioner filed an answer to the charges instituted in the Appellate Division containing, as a fifth affirmative defense, a contention that inasmuch as he had testified before the Grand Jury and received immunity from prosecution, that portion of the disciplinary proceeding (Charges III and IV) predicated upon his aiding and abetting Hulan E. Jack, then borough president of Manhattan, in violating the New York City Charter and conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. Respondent moved to strike all of the affirmative defenses contained in the answer on the ground that they were insufficient as a matter of law. In an affidavit dated February 27, 1963, submitted in opposition to the motion to strike the affirmative defenses and in support of a cross-motion, petitioner's then counsel, Leonard B. Boudin, Esq., stated (para. 24, p. 9):

> *"We pass over the reference to self-incrimination under the Federal Constitution.* In all candor, it does not seem to [petitioner], upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. *In this respect, [respondent] would be entitled to a grant of its motion limited to striking out the reference to the Federal Constitutional privilege against self-incrimination."* (Emphasis supplied.)

Since petitioner himself thereby "passed over" any issue under the Federal constitutional privilege against self-incrimination, the Appellate Division did so also. This was manifested in that Court's denial on two occasions of petitioner's motion to amend the order of disbarment to recite that constitutional questions were raised and necessarily passed upon and by its express finding of abandonment in the decision of which review is here sought.

By order entered March 21, 1963, the Appellate Division granted respondent's motion and struck all of the affirmative defenses contained in petitioner's answer to the charges. Petitioner unsuccessfully sought to appeal that order to the Court of Appeals. In an affidavit dated April 22, 1963, submitted in support of his motion for leave to appeal, petitioner's then counsel stated that one of the issues raised was "whether the granting of immunity to respondent by virtue of his testimony before a Grand Jury does not include protection against a disciplinary proceeding". In view of the abandonment of any claim under the Federal constitutional privilege against self-incrimination contained in the affidavit submitted by the same attorney in opposition to respondent's motion to strike the affirmative defenses, it is clear that this reference was to petitioner's claim under the State constitutional privilege against self-incrimination which petitioner had never withdrawn.

Having thus abandoned any claim under the Federal constitutional privilege against self-incrimination, petitioner did not raise it in the Court of Appeals when he sought to appeal his disbarment as of right and by leave of that Court. Although petitioner submitted affidavits and a brief to the Court of Appeals in opposition to respondent's motion to dismiss his appeal as of right and in support of his

motion for leave to appeal, he did not disclose therein that he had testified before a Grand Jury or that he had done so after having been granted immunity from prosecution. He made no specific reference to the fifth affirmative defense contained in his answer. In fact, in his affidavit of May 25, 1966, in support of his motion for leave to appeal, petitioner, in referring to the striking of his affirmative defenses, stated (p. 20), "principally here involved are my Fourth and Sixth affirmative defenses, which pertained to the contempt charges". He submitted no argument whatever addressed to any claim under the self-incrimination provisions of the Federal Constitution and could not have done so inasmuch as he did not disclose the fact of his appearance before a Grand Jury upon which such an argument would have to be predicated. This failure on petitioner's part to raise the issue in the Court of Appeals was so clear that his prior petition for a writ of certiorari submitted to this Court, in summarizing the arguments raised in the Court of Appeals, made no reference to any claim arising under the privilege against self-incrimination even though that was the principal argument advanced in the petition itself.

We respectfully submit that the foregoing clearly demonstrates, as the Appellate Division has held, a categorical abandonment by petitioner of any claim under the Federal constitutional privilege against self-incrimination. Consequently, the question presented in support of the present petition for certiorari, "whether disbarment is a criminal sanction within the scope of the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to state action, so that incriminating testimony compelled under a grant of immunity is precluded from use in the disciplinary proceeding," cannot now be raised inasmuch

as it does not affirmatively appear from the record that the federal question here urged was presented to the State courts, *Lynch et al* v. *N. Y. ex rel. Pierson,* 293 U. S. 52; *Ellis* v. *Dixon et al., Members of the Board of Education of the City of Yonkers,* 349 U. S. 458.

POINT IV

The decision of this Court in *Spevack* v. *Klein* does not warrant retroactive application.

The decision in *Spevack* v. *Klein, supra,* was announced on January 16, 1967. Petitioner's first petition for certiorari, submitted to this Court while the *Spevack* case was awaiting decision, was denied on January 9, 1967. His disbarment, under the order of the Appellate Division of April 21, 1966, became effective on that date when the stay granted by Mr. Justice Harlan pending determination of the petition expired.

This Court, of course, gave no indication in deciding *Spevack* as to whether it should be applied retroactively. However, this Court's recent opinions with respect to the issue of retroactivity strongly suggest that decisions involving interpretations of the constitutional privilege against self-incrimination, such as *Spevack,* will be given prospective effect only. Thus, retroactivity was denied to the doctrine of *Griffin* v. *California,* 380 U. S. 609, forbidding adverse comment upon a defendant's failure to testify in a state criminal trial, in *Tehan* v. *Shott,* 383 U. S. 406. Similarly, retroactivity was denied to the doctrines promulgated in *Escobedo* v. *Illinois,* 378 U. S. 478 and *Miranda* v. *Arizona,* 384 U. S. 436, in *Johnson* v. *New Jersey,* 384 U. S. 719.

In the latter case, this Court noted, 384 U. S. at 727-8, that constitutional rules announced by it would be applied retroactively if they concerned evidence of doubtful reliability and relevancy, affecting the very integrity of the fact-finding process, with the result that retroactivity averted the danger of convicting the innocent. Since there is no basis for concluding that testimony improperly compelled by the threat of disbarment for silence, a procedure declared to be unconstitutional in *Spevack*, in any way bears upon the accuracy and reliability of such testimony, it would appear that the *Spevack* decision is to be given prospective effect only and is not applicable to cases, such as that of petitioner here, concluded prior to the announcement of that decision.

POINT V

The immunity afforded respondent was co-extensive with the scope of the privilege against self-incrimination and did not afford immunity against disciplinary proceedings.

Self-incriminating testimony may be compelled by a grant of immunity co-extensive with the scope of the privilege, *Counselman* v. *Hitchcock*, 142 U. S. 547. Since the privilege itself prohibits the use of compelled testimony only in a criminal case, and petitioner admittedly received immunity from criminal prosecution when he testified before the Grand Jury, it follows that the constitutional provision has been satisfied and that petitioner's testimony was not improperly compelled. Moreover, since disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 108 U. S. 265, 288, the immunity conferred

upon petitioner did not prohibit the filing of charges of misconduct predicated upon the subject matter of his testimony before the Grand Jury.

In an effort to overcome the clear wording of the constitutional provision, petitioner argues that the recent decisions of this Court in *Spevack* and related cases expanded the term "in any criminal case" as used in the Fifth Amendment to include disciplinary proceedings. We respectfully submit that nothing contained in any decision of this Court warrants such a conclusion.

The principal case upon which petitioner relies is *Spevack* v. *Klein, supra.* Had this Court intended that its decision in that case should stand for the proposition that the privilege against self-incrimination permitted an attorney to refuse to answer a question in the course of a disciplinary proceeding upon the ground that his answer might tend to subject him to discipline (which necessarily follows if disciplinary proceedings are encompassed within the term "in any criminal case" used in the Fifth Amendment), it would undoubtedly have said so and the issue there posed would have been immediately resolved. No such proposition is contained in the Court's opinion.

The majority opinion in *Spevack* indicates that the Court did not expand the scope of the privilege but rather found that the act of the State, disbarment, was an improper form of compulsion forcing the attorney to relinquish his constitutional privilege not to incriminate himself "in any criminal case". Thus, Mr. Justice Douglas, writing for the majority, stated:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood,

> are powerful forms of compulsion to make a lawyer relinquish the privilege."

It follows, therefore, that this Court reversed the disbarment in *Spevack,* not because the attorney there involved had the right to refuse to answer questions which might tend to subject him to discipline (such questions being outside the scope of the privilege), but because disbarment was an improper penalty for the attorney's exercise of his constitutional right not to answer questions which might tend to incriminate him, he, unlike petitioner here, having no immunity from criminal prosecution.

The fact that this Court's decision in *Spevack* turned upon a finding of improper compulsion rather than expansion of the scope of the privilege against self-incrimination appears from the related case, decided the same day, of *Garrity* v. *New Jersey,* 385 U. S. 493. There the Court prohibited the use by the prosecution at a criminal trial of testimony compelled by threat of loss of job upon refusal to answer for any reason, The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants, who also unlike petitioner here did not have immunity from criminal prosecution, had been improperly compelled. Thus, the Court, again speaking through Mr. Justice Douglas, stated:

> "The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent . . . "

It was precisely because this Court did not expand the scope of the privilege but concerned itself with a determi-

nation of conduct by the State which constituted improper compulsion directed toward an individual to force him to waive his existing privilege against self-incrimination, that Mr. Justice Fortas could concur in the *Spevack* decision while pointing out that, in his judgment, a public employee who refused to answer questions directly related to the performance of his official duties could be discharged even though his refusal was predicated upon the invocation of the privilege against self-incrimination. This expression by Mr. Justice Fortas, whose vote was essential to the majority in *Spevack*, is inconsistent with petitioner's assertion that the scope of the privilege must be interpreted to encompass any governmental act which in any sense "punishes" or affects the individual adversely.

The dissenting opinion of Mr. Justice White further indicates that the Court itself considered *Spevack* to be simply a "compulsion" case and not one expanding the scope of the privilege. Thus, he dissented upon the ground that the attorney in *Spevack* could not give any statements which would tend to incriminate him since, if they were furnished under the compulsion of threat of disciplinary action if he refused, *Garrity* prohibited their use against him in any subsequent criminal prosecution. As in the case of the concurring opinion of Mr. Justice Fortas, this dissenting view is inconsistent with the interpretation advanced by petitioner that the majority opinion in *Spevack* stands for the proposition that the attorney had the right to refuse to answer questions because they might tend to subject him to discipline, a contention which necessarily flows from the claim that the immunity tendered by the Grand Jury encompasses the imposition of discipline because immunity must be as extensive as the scope of the privilege.

It should be noted, moreover, that the present case is factually as well as legally distinguishable from *Spevack* and the other cases relied upon by petitioner, *Kaye* v. *Coordinating Committee,* 386 U. S. 17 and *Zuckerman* v. *Greason,* 386 U. S. 15, rehearing den., 386 U. S. 969. Thus, petitioner here, unlike any of the attorneys in the cited cases, received immunity from criminal prosecution after first invoking his privilege against self-incrimination. Consequently, in each of the cases relied upon by petitioner the attorney was faced with the still existing possibility that he might be subject to criminal prosecution for any crime disclosed if he answered, while petitioner had been granted complete immunity from such prosecution.

In addition to relying upon decisions of this Court which were pending at the time his first petition for certiorari was denied but which were only later announced, petitioner also reasserts contentions predicated upon prior decisions of this Court, principally *Boyd* v. *United States,* 116 U. S. 616. Such claims, in addition to being untimely, find no support in the opinions relied upon. Thus, *Boyd* and subsequent decisions of this Court which followed it, are distinguishable. As the Court noted in *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute, i.e. to incriminate himself.

It is significant to note, in this context, that the record discloses that petitioner was not misled concerning the ex-

tent of the immunity afforded to him before the Grand Jury. Thus, when called as a witness at the trial of the case of *People* v. *Jack,* petitioner conceded that it was his understanding that he had received immunity from prosecution for crimes but had not received immunity from any "disbarment proceeding" that might be instituted (Pet. Ex. 11, p. 321; Min. p. 1734).

In substance, petitioner is contending that a disciplinary proceeding is "a criminal case" within the meaning of the Fifth Amendment of the Constitution of the United States. Yet he has himself acknowledged that other principles of criminal law are inapplicable to such proceedings. Thus, in his brief to the Court of Appeals of the State of New York in support of his motion for leave to appeal from the order of disbarment, petitioner himself stated, in part, that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here".

This Court has likewise continued to recognize the essential civil nature of disciplinary proceedings since the decision of *Ex Parte Wall, supra,* in 1882. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

In summary, it is respectfully submitted that petitioner's contention that the immunity he received from prosecution for any crimes revealed in his testimony before the Grand

Jury also immunized him against any disciplinary proceeding is clearly without merit. Adoption of that proposition would mean, for example, that an attorney who had bribed a public official and had been given immunity from prosecution for the crime in order that his testimony might be used in criminally prosecuting that public official, would thereafter not only be immune from prosecution for his own crime but would have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had corrupted. Such an astounding proposition finds no support in the Fifth Amendment or in any of the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

---

1. The present petition for a writ of certiorari is directed to the holding of the Appellate Division on April 25, 1967, as one of the grounds for its denial of petitioner's motion for reconsideration, that the Federal privilege against self-incrimination "does not inhibit the use in a disciplinary proceeding of testimony" compelled under a grant of immunity because "the Fifth Amendment proscribes compelled testimony in 'any criminal case' " and "it has not been held that a disciplinary proceeding is in the nature of a ciminal cause." Since the court below did not address itself to the scope of

the federal privilege against self-incrimination in the prior proceedings but did so in the manner indicated above only in denying petitioner's motion for reconsideration, the present petition obviously seeks review of the Appellate Division's order denying reconsideration in partial reliance on its interpretation of the Federal Constitution and is, in no sense, as contended by respondent, a petition for rehearing of the denial of his earlier petition for certiorari.

2. In reiterating the argument that petitioner abandoned any claim arising under the federal privilege against self-incrimination, respondent quotes a portion of an affidavit of counsel submitted in opposition to a motion to strike the affirmative defense asserting the privilege. Counsel acknowledged in the portion quoted that reliance upon the self-incrimination provisions of the federal constitution did not appear to be well grounded. Respondent's quotation from the affidavit omits, however, the sentence immediately following the language quoted in which petitioner's counsel objected to striking the reference to the federal constitutional privilege against self-incrimination because of his continued reliance on "his right to due process of law under the Federal and State Constitutions." [1] Respondent's argument, therefore, is reduced to nothing more than an exercise in semantics. The acknowledgement of doubt as to the validity of a constitutional claim does not constitute abandonment particularly since any doubts that may have been entertained with respect to the availability of the privilege to an attorney in a state proceeding were clearly justified by this Court's decisions at the time. See, e.g., *Cohen v. Hurley*, 366 U.S. 117; *Nelson v. Los Angeles County*, 362 U.S. 1; *Lerner v. Casey*, 357 U.S. 468; *Knapp v. Schweitzer*, 357 U.S. 371.

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[1] The pertinent portion of the affidavit in question is set forth in full in the Appendix to the petition, page A-7.

In any event, the claimed abandonment of the privilege is rendered irrelevant by petitioner's renewed reliance upon it after this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1, rejecting prior decisions holding the federal privilege against self-incrimination inapplicable to the states, and *Spevack v. Klein*, 385 U.S. 511, overruling *Cohen v. Hurley* and holding that the privilege may be invoked by attorneys with impunity. These decisions constituted supervening events which permitted the constitutional question to be raised again by petitioner's motion for reconsideration. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co. v Hill*, 281 U.S. 673. Moreover, the federal constitutional question raised by the motion for reconsideration is appropriately presented for review by this Court since it was considered and passed upon by the court below. *Illinois Central Railroad Co. v. Kentucky*, 218 U.S. 551; *Bowe v. Scott*, 233 U.S. 658, 663; *Great Northern Railroad Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367; *Whitney v. California*, 274 U.S. 357, 360.

3. Respondent argues against the grant of certiorari for the reason that *Spevack v. Klein, supra*, did not hold disbarment to be a criminal penalty within the scope of the privilege against self-incrimination. Although respondent's brief in opposition implies the contrary, petitioner does not urge that certiorari be granted because *Spevack v. Klein*, 385 U.S. 511, decided the Fifth Amendment question here in issue, but rather because it did not. It is precisely because the Court's decisions in *Spevack v. Klein* and other cases leaves unresolved this important question that petitioner urges certiorari should be granted. The petition discusses a number of decisions of this Court which suggest that the constitutional question considered and passed upon by the court below was probably incorrectly decided. As the petition points out, this interpretation of the Federal Constitution will

undoubtedly be the rule of decision in a number of other disciplinary proceedings. The case, therefore, is an appropriate one for the Court's exercise of certiorari jurisdiction.

Respectfully submitted,

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